

**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SIXTH DISTRICT**

RICHARD LEE MASSEY,)	
Appellant,)	
)	
v.)	Case No. 6D23-2152
)	
CITY OF PUNTA GORDA,)	
Appellee.)	
<hr style="border: 1px solid black;"/>)	

MOTION FOR ATTORNEYS' FEES AND COSTS

COMES NOW the Appellant Richard Lee Massey (hereinafter "Massey"), by and through the undersigned counsel, and moves pursuant to Fla. R. App. Pro. 9.400(b)(1) for attorneys' fees and costs in this appeal should he prevail. For the reasons set forth below, Massey respectfully requests that this Motion be granted.

Massey has appealed to this Court from a Final Order denying his motion for attorneys' fees and costs pursuant to Fla. Stat. § 57.112(2) and § 768.295(3) as well as Fla. R. App. Pro. 9.400. If Massey prevails in this appeal as to either statute, that statute would entitle him to attorneys' fees and costs incurred related to this appeal as well.

Fla. Stat. § 57.112(1) states in relevant part that "the term 'attorney fees and costs' means the reasonable and necessary attorney fees and

costs incurred for *all* preparations, motions, hearings, trials, *and appeals in a proceeding*” (emphasis added). This appeal is part of the proceeding, and is therefore encompassed by the term “attorney fees and costs” in Fla. Stat § 57.112.

Further, Fla. Stat. § 57.112 was recently amended, to be effective October 1, 2023, by, among other things, adding in subsection (3) for challenging the adoption of a local ordinance on the grounds that it is arbitrary or unreasonable. The Legislature included solely in that specific subsection that “a prevailing plaintiff may not recover any attorney fees or costs directly incurred by or associated with litigation to determine an award of reasonable attorney fees or costs.” § 57.112(3), Fla. Stat. (2023). This provision is not included in subsection (2) of Fla. Stat. § 57.112.

By including this provision solely within new subsection (3)—rather than making it a separate subsection applicable to the entire statute, and rather than amending subsection (2) by adding the same or similar provision—the Legislature has clearly indicated and confirmed that attorney fees and costs directly incurred by or associated with litigation to determine an award of reasonable attorney fees and costs is recoverable for prevailing in a challenge against an ordinance under subsection (2) on the grounds that it is expressly preempted, as Massey has done here.

This reasoning is consistent with the Florida Supreme Court’s holding that “the concept of reading statutes *in pari materia* does not require that elements from one subsection be carried over and inserted into another subsection even if the statutes are related.” State v. Bradford, 787 So.2d 811, 819 (Fla. 2001) (concluding that the lower court’s reasoning that a provision of one subsection was necessarily incorporated into another subsection was “premised on a misguided interpretation”). The Court further explained that “there was ample opportunity” to include the element from one subsection into the other, “yet the Legislature did not do so;” and “the Legislature was well aware of how to incorporate the element of [one subsection] into these [other] subsections..., yet it declined to do so.” Id. at 820. Such is the situation here, where the Legislature clearly had ample opportunity to include the provision from subsection (3) into subsection (2) of Fla. Stat. § 57.112, and yet declined to do so.

Additionally, **Fla. Stat. § 768.295(4)** states in relevant part that “[t]he court shall award the prevailing party reasonable attorney fees and costs *incurred in connection with a claim* that an action was filed in violation of this section” (emphasis added). Thus, any attorney fees and costs incurred in connection with a claim that an action was filed in violation of Fla. Stat. § 768.295, as Massey has claimed here, is recoverable as well under the

plain meaning of the statute. See State v. Peraza, 259 So.3d 728, 730, 733 (Fla. 2018) (“The starting point for any statutory construction issue is the language of the statute itself—and a determination of whether that language plainly and unambiguously answer the questions presented.”).

These interpretations of Fla. Stat. § 57.112(2) and § 768.295(3) as awarding attorneys’ fees and costs “for litigating the issue of entitlement to attorney’s fees” is consistent with the Florida Supreme Court’s ruling and rationale in State Farm Fire & Cas. Co. v. Palma, 629 So.2d 830, 833 (Fla. 1993). In that case, the Court determined that such fees are recoverable under a statute, which stated that a court “shall adjudge or decree...a reasonable sum as fees or compensation for the insured’s or beneficiary’s attorney prosecuting the suit in which recovery is had.” Id. at 832 (quoting § 627.428(1), Fla. Stat. (1983)).

Even though that statute did not explicitly state that attorneys’ fees for litigating entitlement to attorneys’ fees are recoverable, the Court nevertheless found that awarding attorneys’ fees for litigating entitlement to attorneys’ fees fell within the scope and purpose of the statute “to discourage the contesting of valid claims...and to reimburse successful insureds for their attorney’s fees when they are compelled to defend or sue to enforce their insurance contracts.” Id. at 833. Additionally, the

concurrence noted that the “purpose of the attorneys fees legislation is to make legal representation more widely available to those who need it.” Id. at 834 (Kogan, J., concurring in part, dissenting in part).

Such is the situation here. Both Fla. Stat. § 57.112(2) and § 768.295(3) discourage unconstitutional ordinances and SLAPP suits, respectively, and provide attorneys’ fees for having to defend against such invalid claims and in order to make legal representation more widely available to those who need it, as Massey needed here for his defense.

If attorneys’ fees and costs are not provided under Fla. Stat. § 57.112(2) or § 768.295(3), then Massey would move for costs of this appeal to be awarded pursuant to Fla. R. App. Pro. 9.400(a) should he prevail on any of his claims in this appeal.

For these reasons, Massey should be entitled to recover reasonable attorneys’ fees and costs in an amount to later be determined if he prevails in this appeal. Wherefore, Massey respectfully requests that this Motion for Attorneys’ Fees and Costs be granted by this Court.

Respectfully submitted,

/s/ Phares Heindl

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Certificate of Service

I certify that this Motion for Attorneys' Fees and Costs has been furnished for service to David M. Levin, attorney for Appellee City of Punta Gorda, by and through the Court's e-filing Portal on October 12, 2023.

/s/ Phares Heindl

Phares Heindl
Attorney for Appellant